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No. 08-1027

In the
SUPREME COURT OF THE UNITED STATES

ALLIANCE FOR COMMUNITY MEDIA, ET AL.

Petitioners,

v.

UNITED STATES OF AMERICA;
FEDERAL COMMUNICATIONS COMMISSION

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

REPLY BRIEF FOR THE PETITIONERS

1. a. Respondents' brief demonstrates that the Order[1] rests on a radical view of Federal Communications Commission regulatory authority. Respondents explain that while the FCC has had authority to regulate *operational* aspects associated with the provision of cable service, the FCC has never issued franchises authorizing placement of cable systems on state or local property. Respondents' Brief in Opposition ("BIO") 2. Accordingly, Respondents correctly describe a principle at the heart of Title VI of the Communications Act (the "Cable Act"): "Under Title VI, a cable operator may not provide cable service in a given area without *first* obtaining a franchise from the state or local government." (BIO 3 (emphasis added).) However, by the end of their brief, despite the centrality of this principle to Congress's division of authority between states and local governments and the FCC, Respondents openly repudiate it. They assert that a cable operator may provide cable service in a local jurisdiction if the FCC allows it by *federal* rule. (BIO 20.) This unprecedented change in law is the Order's defining feature: it transforms the Cable Act's franchising process, which explicitly relies on state and local governments acting to assure that "cable systems are responsive to the needs and interests of the local community," 47 U.S.C. §521(2)), into a process designed to serve *federal* rules untethered to local needs. It permits

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[1] Pet. App. 55a-329a ("Order").

the FCC to declare a right to occupy state and local property "deemed granted," although no authority for that power can be identified.

This new federal franchising process conflicts with *City of New York v. FCC*, 486 U.S. 57, 61 (1988), where this Court found that the "Cable Act left franchising to state or local authorities;" and is inconsistent with the clear intent and direction of Congress in the Cable Act.[2] Respondents contend (BIO 18) that Petitioners' complaint is merely about "whether it will be the FCC or the federal courts that draw the lines to which they must hew." That is not the case. As the Sixth Circuit itself recognized, in *Union CATV v. City of Sturgis*, 107 F.3d 434, 441 (6th Cir. 1997), the Cable Act purposefully permitted localities to make choices as to franchise terms and conditions, based on local needs and interests. It is the transformation of the franchising process from a local into a federal agency-directed process that is a central problem here. The transformation justifies review, particularly given the federalism concerns underlying cable franchising.

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[2] Respondents (BIO 21) are correct that *New York* recognizes that the Cable Act retained certain FCC authority over *operational* aspects of cable television, but ignore the corresponding affirmation that franchising power is local. This case requires the Court to find that contrary to *New York*, franchising authority rests with and is controlled by the FCC.

b. Review is equally important because the Order rests on an untenable view of agency authority and the deference that is owed to agency determinations under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

The Cable Act gives the FCC no authority to issue franchises,[3] regulate the franchising process, or declare local laws preempted. The FCC claimed all those rights under its general regulatory authority under 47 U.S.C. §201(b). Pet. App. 203a ¶129; BIO 18. In upholding such unprecedented powers as the product of general rulemaking, the Sixth Circuit did not weigh these powers against the structure of the Cable Act. Instead, the court simply determined that §201(b) gave the Commission authority to devise prophylactic rules, and declare laws preempted, because Congress did not explicitly deny that authority. *See* BIO 11.

Other courts have recognized that this approach conflicts with basic principles of administrative law, and it is important for this Court to resolve the conflict created by the Sixth Circuit's decision. "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution."

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[3] Petitioners and Respondents agree that the FCC has no franchising authority under the Cable Act. 47 U.S.C. §522(10).

Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 805-806 (D.C. Cir. 2002). The Sixth Circuit's assumption that the FCC is entitled to make preemptive determinations, and that those determinations are entitled *Chevron* deference, is also inconsistent with this Court's decision in *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 & n.9 (2009), and raises concerns related to those in *Cuomo v. The Clearing House Ass'n*, No. 08-453, *cert. granted* Jan. 16, 2009.

2. a. *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), does not resolve this case. As *AT&T* explains, §201(b) permits the FCC to regulate where the Act "applies" and then as "necessary" to "carry out the provisions of the Act." *Id.* at 377-379. This requires a court to analyze the structure of the relevant provisions in context. That the Cable Act was "inserted" into the Communications Act does not, as Respondents and the Sixth Circuit believed, in and of itself determine whether or in what manner the FCC may implement §621(a)(1), much less determine whether particular actions (like preemption determinations) are entitled to *Chevron* deference. *See* Pet. 23-27

b. This distinction has been implicitly recognized by this and other courts. *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45, 60 (2007), found the FCC's remedial authority was delimited by the traditional and historical reach of §201(b). If the Sixth Circuit's view were correct, the last sentence of

§201(b) would foreclose any such limiting principle (a point Respondents' arguments ignored). *Accuracy in Media v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), recognized that the Public Broadcasting Act creating the CPB did not limit "established FCC authority" under §303. *Id.* at 295-96. Under the Sixth Circuit's view of *AT&T*, that would end the matter, as that law was "inserted" into the Communications Act. The *AIM* court instead properly concluded, by examining the structure of the Public Broadcasting Act and whom and what the FCC may regulate under §151, that the FCC could not exercise supervisory authority over the CPB without an explicit grant. *Id.* at 294.[4]

c. Under the Sixth Circuit's and Respondents' reading, *AT&T* confers virtually unlimited authority on the FCC not merely to "guide" interpretation of the law, but to create authority where none exists (as here, where the FCC finds the authority to grant franchises). Certiorari is important to make clear that *AT&T* neither permits

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[4] *AIM* rejects Respondents' contention that the case turned on the express limitation of authority under §398. 521 F.2d at 292. That provision merely explained that "nothing in this part" authorizes agency regulation. §§201(b) and 303(r), which fall outside the part, were not affected. Other courts have found the FCC's general regulatory authority may be limited even in the absence of delimiting language, *MPAA, supra.* The Sixth Circuit ignored this possibility.

federal agencies to use general regulatory authority in this manner, nor alters the limits on preemptive deference announced in *Wyeth*. Contrary to Respondents' contention (BIO 12-13), this case squarely raises questions regarding the scope of the agency's authority under its general rulemaking powers that do not depend on whether the FCC relied on §201(b), §303(r), or both, in issuing the Order.[5]

3. Nor can the *Chevron* issues in this case be blithely dismissed (BIO 13-15) as not warranting review. The application of *Chevron* particularly where core federalism issues are implicated, raises significant, and not fully resolved issues, as *Wyeth* recognizes.

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[5] Respondents read Petitioners as claiming that §201(b) applies only to Title II. That is not Petitioners' claim. Petitioners' central point is that the application of §201(b) or other general regulatory provisions is circumscribed by specific choices made by Congress in Title VI. Hence, when Congress provides for issuance of a franchise by state and local governments, the FCC is not free to use "general regulatory authority" to create franchising powers in itself. It is certainly doubtful whether in light of §152, §201(b) or §303(r) can be used to regulate the franchising process itself (as opposed to permitting the FCC to determine whether a particular entity or system is subject to the Cable Act, which was the issue in the cases cited by Respondents).

a. Under *Chevron,* the first question is whether the agency was acting to fill a "gap" Congress has authorized it to fill, a question a court is to answer by applying traditional rules of statutory interpretation. Respondents virtually concede (BIO 14) that the Sixth Circuit never took that step.[6] To the extent that the court looked at context, it adopted a dangerous, unjustified rule: because Congress empowered *the courts* to decide whether LFA had "unreasonable refuse[d]" to grant a franchise, the statutory phrase must be "capable of multiple meanings" and thus susceptible to agency interpretation under *Chevron.* Pet. App. 30a. As Petitioners explained, and Respondents fail to rebut, this requires the Court to find that under *Chevron,* Congress's choice to delegate questions to Article III courts bestows additional authority on *other* federal government branches.[7]

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[6] The Sixth Circuit did not find, as Respondents claim, that the term "unreasonably refuse" is vague in §621 because it is vague in other contexts. The court recognized "vagueness" must be examined in the specific context of the Cable Act. Petitioners showed that the phrase is not vague in context, and is a standard for court review of local determinations, rather than an invitation for FCC action.

[7] This led the Sixth Circuit to conclude that, notwithstanding the specific review provisions of the Cable Act, §201(b) gave the FCC authority "co-extensive" with the courts. Contrary to Respondents' claim (BIO 13), Petitioners did not contend that the

b. When Congress delegates general rulemaking power to an agency, it empowers the agency "to carry out" and clarify the *existing* provisions of law, not to create new provisions or transform existing ones. An agency may not, for example, use "regulatory sleight of hand" to transform a statute's "fact-specific inquiry" into a *per se* rule. *See* Pet. 38; *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002). Respondents' contention (BIO 17 n.2) that there are "no such deficiencies" in the FCC's rules ignores the obvious: the FCC transformed a fact-specific inquiry of whether an LFA has "unreasonably refuse[d]" into a series of fixed, federal rules, and into a federal power to issue a franchise. Pet. 35-37.

Rather than determine the scope of permitted regulation after reviewing the structure of the Cable Act and applying traditional interpretive tools, the Sixth Circuit assumed the FCC's general authority empowered it to take those actions. So interpreted, the FCC's general rulemaking authority is untethered to the fundamental notion that such authority merely allows the FCC to implement the *existing* statutory scheme, not to create a new one.[8]

Sixth Circuit merely misapplied the settled *Chevron* doctrine, but that it fundamentally changed settled law (and re-writes the Cable Act) through this test. Pet. 16, 28-31.

[8] The treatment of the canon of *expressio unius est exclusio alterius* (BIO 14-15) is also illustrative. The

4. What Respondents characterize at 19-20 as "miscellaneous" challenges involve substantial constitutional and statutory issues emphasizing the importance of review.

a. If an LFA fails to act on a franchise by a deadline set by the FCC, "*it* 'will be deemed to have granted . . . an interim franchise based on the terms proposed'" by the applicant. (BIO 7.) Respondents contend that the FCC rules merely give LFAs the choice of acting in accordance with the FCC rules,[9] or "*allow[ing] federal rules to fill the regulatory void with an interim franchise.*" (BIO 20 (emphasis

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Sixth Circuit did not find, as Respondents argue, that the doctrine did not apply because the act had no series. In fact, Congress did include a series of timelines in the Communications Act, but omitted deadlines from §621(a)(1), *see* Pet. 33-34. Instead, the court found that the canon does not apply in administrative settings, a position rejected by other courts. *Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000).

[9] Respondents' assertion that the Order does not "prescribe any particular elements that a franchise must include" is belied by the breadth of the Order itself, which purports to find that "local laws, regulations, practices, and requirements" that "conflict with the rules or guidance adopted in this Order" are preempted unless specifically authorized by state law. Pet. App. 200a ¶ 126.

added).) But giving an LFA a "choice" between acting as directed by the FCC, or being "deemed to have granted" a franchise itself, is no choice at all under principles of federalism and the Tenth Amendment. U.S. Const. amend. X; *New York v. United States*, 505 U.S. 144, 162 (1992). The rule also runs afoul of the Fifth Amendment. U.S. Const. amend. V. The installation of a cable facility without the consent of the property owner is a *per se* taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Respondents claim the Fifth Amendment is not violated because the Order requires payment of a franchise fee. (BIO 19 n.3). Not so: the Order states that the interim franchise is granted on the terms set out in a cable operator's application, and so is granted whether or not the terms include compensation. Pet. App. 155a ¶ 77. That is a taking.

b. If the FCC is assumed to itself issue the franchise under the "deemed granted" rule (as opposed to usurping local legislative authority by deeming it granted by the LFA), an insuperable statutory issue arises: the FCC cannot issue franchises. Nor do constitutional issues disappear. Respondents contend (BIO 18-19) that the FCC's actions were unobjectionable, reflecting the agency's exercise of authority delegated to Congress under the Commerce Clause. Cases cited by Respondents all involve regulation of interstate commerce, where the courts have recognized that states may be given the choice of regulating in accordance with federal standards, or leaving regulation to a federal agency.

(BIO 19-20.) But the exercise of state and local franchising power involves the control of state and local property, and the exercise of state and local legislative processes – matters not delegated to Congress by the Commerce Clause. When a federal agency asserts the right to control sovereign property within a state, rather than the persons engaged in interstate commerce or the interstate activity itself, the agency intrudes on the core sovereignty of the state. Finding such unprecedented authority based on a "regulatory void," BIO 20; Pet. App. 134a ¶ 60; *id.* 155a ¶ 78, is itself extraordinary, conflicts with decisions of other circuits,[10] and warrants review.

c. Respondents contend (BIO 19) that these problems can be ignored as any interim franchise is temporary, and can be terminated once an LFA makes a franchising decision. If the FCC cannot issue franchises, it cannot issue them temporarily. Fifth Amendment problems do not disappear because occupancy is for a short period. Tenth Amendment problems do not disappear by

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[10] *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), holds that §621(a)(1) regulates the local exercise of the franchising authority, which derives from state law, not §621(a)(1). *Id.* at 348. §621 creates a federal franchising *requirement*, not federal franchising authority. Accordingly, the FCC may not consistent with *Dallas*, create federal power to issue a local franchise by clarifying the requirement in §621(a)(1).

allowing a local government to escape a "deemed grant" by regulating under FCC rules. Respondents' claim simply underscores that the "interim franchise" is intended to leave localities no choice but to regulate as the FCC directs.

d. The FCC adopts the "deemed granted" remedy without regard for the specific remedy prescribed by Congress: court review under §635, 47 U.S.C. § 555. Respondents emphasize that the FCC found that court review involves "delay, legal uncertainty" (BIO 6); but to read §201(b) to permit the FCC, for that reason, to create a non-judicial remedy, is to authorize the agency to rewrite the Act.

5. Under *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951), a court may not "deem itself merely a judicial echo of [an agency's] conclusion," but instead must weigh the substantiality of the evidence by taking "into account whatever in the record" detracts from the agency's finding. *Id.* at 488. Contrary to Respondents' claim (BIO 22), Petitioners do not maintain that the Sixth Circuit was required to undertake the "time-consuming and difficult task" of weighing the evidence. *Consolo v. FMC*, 383 U.S. 607, 620 (1966). However, as Respondents admit (BIO 5) and as is clear from the Order, Pet. App. 78a *et seq.*, the decision here depends on the finding that LFAs were abusing the franchising process and delaying competitive entry. As Commissioner Adelstein indicated, that conclusion was not based on weighing the evidence as a whole: the Commission "simply

accepts in every case that . . . local governments are wrong . . . without bothering to examine the facts." Pet. App. 298a.

The Sixth Circuit therefore had a duty to ensure that the FCC did not ignore evidence contrary to that conclusion. The text of the decision indicates it did not do so. This failure is not excused by *INS v. Elias Zacarias*, 502 U.S. 478, 481 (1992), which did not involve an agency that ignored contrary evidence.[11] Agency failure to take contrary evidence into account constitutes an *independent* condition justifying reversal, *regardless* of whether a factfinder would conclude the agency was wrong. *Menendez-Donis v. Ashcroft*, 360 F.3d 915, 919 (8th Cir. 2004). It is particularly important that the Court reaffirm this principle where a federal agency purports to regulate the authorized legislative activities of local governments based on the supposed failure of these entities to follow the law.

CONCLUSION

Given the significance of the constitutional and statutory issues, and the unwarranted expansion of administrative authority underlying the Sixth Circuit's decision, the petition should be granted.

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[11] *Zacarias's* language is in part a reflection of the Immigration and Nationality Act, where the alien seeking asylum bears the burden of proof.

Respectfully submitted,

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